

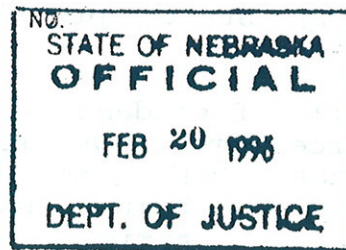


STATE OF NEBRASKA
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STEVE GRASZ
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DATE: February 20, 1996

SUBJECT: Nebraska Public Service Commission Jurisdiction to
Grant to a Railroad a Right to Use Trackage of
Another Railroad.

REQUESTED BY: Rod Johnson, Commissioner
Nebraska Public Service Commission

WRITTEN BY: Don Stenberg, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our advice on a question regarding the jurisdiction of the Nebraska Public Service Commission ["Commission"] to grant to a railroad a right to use trackage of another railroad. You indicate that the City of Grand Island ["City"] is currently considering potential options to allow the Burlington Northern Railroad Company ["BN"] rail access to its power plant. Presently, rail access to the plant is limited to mainline and spur trackage owned by the Union Pacific Railroad Company ["UP"]. The City has asked the Commission for an informal opinion concerning the Commission's authority, pursuant to Neb. Rev. Stat. § 75-428 (Cum. Supp. 1994), to order UP to grant a right of access or usage of its trackage to BN.¹ While we believe it is

¹ Neb. Rev. Stat. § 75-428 generally provides a railroad the right to "cross, intersect, join, and unite its railroad with any other railroad", and requires railroads, "at all points of connection, intersection, or crossing at grade of different railroads, . . . , to provide reasonable, ample, and equal facilities by track connection, passenger platforms, and otherwise, for transferring cars, passengers, and property between their

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doubtful that § 75-428 could be construed to grant the Commission authority to grant such a request, it is unnecessary for us to consider whether the Commission has jurisdiction to act under the statute, or its constitutional grant of authority to regulate common carriers under Neb. Const. art. IV, § 20, in light of recent federal legislation preempting state jurisdiction of such regulation of railroad trackage.

On December 29, 1995, the President signed legislation abolishing the Interstate Commerce Commission. ICC Termination Act of 1995 [P.L. 104-88, 109 Stat. 803] [the "Act"]. The Act abolished the Interstate Commerce Commission, and transferred the Commission's jurisdiction over rail carriers to a newly-created Surface Transportation Board ["Board"]. Section 10501 of the Act, which sets forth the jurisdiction of the Board over transportation by rail carrier, provides:

(b) The jurisdiction of the Board over--

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers, and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

(emphasis added).

The Supremacy Clause of the United States Constitution renders void any state laws that "interfere with or are contrary to" federal law. *Hillsborough County v. Automated Medical*

respective roads without unreasonable delay." This section further provides that, if railroads are unable to agree on the compensation to be paid for such accommodations, the Commission shall determine the amount of compensation. *Id.*


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Laboratories, Inc., 471 U.S. 707, 712 (1985) (quoting *Gibbons v. Ogden*, 9 Wheat 1, 211 (1824)); U.S. Const. art. VI, cl. 2. The crucial inquiry in preemption cases concerns whether Congress has manifested an intent to preclude the challenged state statute or regulation. *Malone v. White Motor Corp.*, 435 U.S. 497 (1978). A congressional intent to preempt may be explicitly expressed by federal statute, or may be implicit in its structure and purpose. *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); see also *Pacific Gas and Elec. Co. v. State Energy Resources Comm'n.*, 461 U.S. 190 (1983); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

Section 10501(2) of the ICC Termination Act provides that the Board has "exclusive" jurisdiction over "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State," It further provides that, unless otherwise provided, "the remedies provided under this part with respect to rail transportation are exclusive and preempt the remedies provided under Federal or State law." *Id.* This language clearly and unequivocally constitutes an expression of Congressional intent to preempt state jurisdiction over railroads of the type contemplated in your request. Accordingly, it is our opinion that, notwithstanding any language in Neb. Rev. Stat. § 75-428 (Cum. Supp. 1994) which could be construed to permit the Commission to consider acting in the manner proposed by the City, the Commission is without jurisdiction to consider an application seeking an order granting one railroad a right to use trackage of another railroad under the circumstances presented by your request.

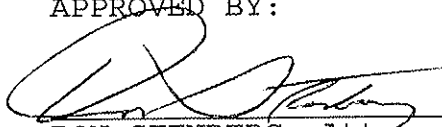
Very truly yours,

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7-44-7.1

APPROVED BY:


DON STENBERG, Attorney General

